LIBRARY
SUPREME COURT, U. S.

Office - Supreme Court, U.S.
FILED
APR 17 1958
JOHN T. FEY, Clerk

No. 856

In the Supreme Court of the United States

OCTOBER TERM, 1957

EDWARD POOL AND LOTTIE POOL, EDWARD POOL, LOTTIE POOL, WILLIAM K. MURPHY, EDNA MURPHY, WILLIAM K. MURPHY AND EDNA MURPHY, PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

J. LEE RANKIN,
Solicitor General,
CHARLES K. RICE,
Assistant Attorney General,
ALEXANDER F. PRESCOTT,
JOSEPH KOVNER,
Attorneys,
Department of Justice,
Washington 25, D. C.

INDEX

	Page
Opinions below	1
Jurisdiction	1
Question presented	2
Statute and regulation involved	2
Statement	4
Argument	13
Conclusion	19

CITATIONS

Cases:

Chandler v. *United States*, 266 F. 2d 403	14
Cohn v. *Commissioner*, 226 F. 2d 22	14
Corn Products Co. v. *Commissioner*, 350 U. S. 46	16
Curtis Co. v. *Commissioner*, 232 F. 2d 167	14, 15, 16, 17, 18
Dillon v. *Commissioner*, 213 F. 2d 218	14
Dougherty v. *Commissioner*, 216 F. 2d 110	14
Galena Oaks Corp. v. *Scofield*, 218 F. 2d 217	14
Goldberg v. *Commissioner*, 223 F. 2d 709	14, 15
Greenspon v. *Commissioner*, 229 F. 2d 947	14, 18
Homann v. *Commissioner*, 230 F. 2d 671	14
Home Co. v. *Commissioner*, 212 F. 2d 637	14, 18
King v. *Commissioner*, 189 F. 2d 122, certiorari denied, 342 U. S. 829	14
Mauldin v. *Commissioner*, 195 F. 2d 714	14
Monday v. *Commissioner*, decided February 20, 1958 (U. S. T. C.)	14
Pacific Homes v. *United States*, 230 F. 2d 755	14
Palos Verdes Corp. v. *United States*, 201 F. 2d 256	14
Philber Equipment Corp. v. *Commissioner*, 237 F. 2d 129	14, 15, 17
Rollingwood Corp. v. *Commissioner*, 190 F. 2d 263	14
Rubino v. *Commissioner*, 186 F. 2d 304, certiorari denied, 342 U. S. 814	14
Shearer v. *Smyth*, 221 F. 2d 478, certiorari denied, 350 U. S. 840	14

Cases—Continued

	Page
Slatkin, Harry Builders v. *Commissioner*, 235 F. 2d 189, certiorari denied, 352 U. S. 928	14
Smith v. *Dunn*, 224 F. 2d 353	14, 15
Three States Lumber Co. v. *Commissioner*, 158 F. 2d 61	14
Victory Housing No. 2 v. *Commissioner*, 205 F. 2d 371	14
Wisnick v. *Commissioner*, 199 F. 2d 374	14
Statute:	
Internal Revenue Code of 1939:	
Sec. 22 (a) (26 U. S. C. 1952 ed., Sec. 22 (a))	2
Sec. 117 (a) (26 U. S. C. 1952 ed., Sec. 117 (a))	2, 13
Sec. 117 (j) (26 U. S. C. 1952 ed., Sec. 117 (j))	3, 13
Internal Revenue Code of 1954:	
Sec. 1221 (26 U. S. C. 1954 ed., Supp. IV, Sec. 1221)	13
Sec. 1231 (b) (26 U. S. C. 1954 ed., Supp. IV, Sec. 1231 (b))	13
Sec. 1237 (26 U. S. C. 1954 ed., Supp. IV, Sec. 1237))	14
Miscellaneous:	
National Housing Administration General Orders Nos. 60-2 and 60-3 (8 Fed. Register 1829-1831)	6, 8
Treasury Regulations 111, Sec. 29.117-1	4

In the Supreme Court of the United States

OCTOBER TERM, 1957

No. 856

EDWARD POOL AND LOTTIE POOL, EDWARD POOL, LOTTIE POOL, WILLIAM K. MURPHY, EDNA MURPHY, WILLIAM K. MURPHY AND EDNA MURPHY, PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The memorandum findings of fact and opinion (R. 29–88) of the Tax Court are not officially reported. The opinion of the Court of Appeals (Pet. App. 1–34) is reported at 251 F. 2d 233.

JURISDICTION

The judgment of the Court of Appeals was entered on December 18, 1957. (Pet. App. 34.) The petition for a writ of certiorari was filed March 15, 1958. The jurisdiction of this Court is invoked under 28 U. S. C., Section 1254.

QUESTION PRESENTED

Whether, as the Tax Court and the Court of Appeals held, the income derived by taxpayers from the sales of certain real property was ordinary income under Section 22 of the Internal Revenue Code of 1939 and not capital gains from the liquidation of an investment under Section 117 (j).

STATUTE AND REGULATION INVOLVED

Internal Revenue Code of 1939:

> SEC. 22. GROSS INCOME.
>
> (a) *General Definition.*—"Gross income" includes gains, profits, and income derived from salaries, wages, or compensation for personal service * * *, or whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; also from interest, rent, dividends, securities, or the transfer of any business carried on for gain or profit, or gains or profits and income derived from any source whatever. * * *
>
> * * * * * *

(26 U. S. C. 1952 ed., Sec. 22.)

> SEC. 117. CAPITAL GAINS AND LOSSES.
>
> (a) *Definitions.*—As used in this chapter—
>
> (1) [as amended by Sec. 115 (b) of the Revenue Act of 1941, c. 412, 55 Stat. 687, and Sec. 151 (a) of the Revenue Act of 1942, c. 619, 56 Stat. 798] *Capital assets.*—The term "capital assets" means property held by the taxpayer (whether or not connected with his trade or

business), but does not include stock in trade of the taxpayer or other property of a kind which would properly be included in the inventory of the taxpayer if on hand at the close of the taxable year, or property held by the taxpayer primarily for sale to customers in the ordinary course of his trade or business, or property, used in the trade or business, of a character which is subject to the allowance for depreciation provided in section 23 (l) * * * or real property used in the trade or business of the taxpayer.

* * * * *

(j) [as added by Sec. 151 (b) of the Revenue Act of 1942, *supra*] *Gains and Losses From Involuntary Conversion and From the Sale or Exchange of Certain Property Used in the Trade or Business.*—

(1) *Definition of property used in the trade or business.*—For the purposes of this subsection, the term "property used in the trade or business" means property used in the trade or business, of a character which is subject to the allowance for depreciation provided in section 23 (l), held for more than 6 months, and real property used in the trade or business, held for more than 6 months, which is not (A) property of a kind which would properly be includible in the inventory of the taxpayer if on hand at the close of the taxable year, or (B) property held by the taxpayer primarily for sale to customers in the ordinary course of his trade or business.

(2) *General rule.*—If, during the taxable year, the recognized gains upon sales or ex-

changes of property used in the trade or business, plus the recognized gains from the compulsory or involuntary conversion * * * of property used in the trade or business and capital assets held for more than 6 months into other property or money, exceed the recognized losses from such sales, exchanges, and conversions, such gains and losses shall be considered as gains and losses from sales or exchanges of capital assets held for more than 6 months. If such gains do not exceed such losses, such gains and losses shall not be considered as gains and losses from sales or exchanges of capital assets. * * *

* * * * *

(26 U. S. C. 1952 ed., Sec. 117.)

Treasury Regulations 111, promulgated under the Internal Revenue Code of 1939:

SEC. 29.117–1. *Meaning of Terms.*— * * *

The exclusion from the term "capital assets" of * * * real property used in the trade or business of a taxpayer is limited to such property used by the taxpayer in the trade or business at the time of the sale, exchange, or involuntary conversion. * * *

* * * * *

STATEMENT

The facts as found by the Tax Court (R. 33–70), and adopted by the court below, may be summarized as follows:

The taxpayers, Edward Pool and Lottie Pool, and William K. and Edna Murphy, are husbands and wives. Arteraft Builders, Inc., is a California corporation organized March 10, 1941, and doing busi-

ness in Los Angeles, and later Long Beach. (R. 33–34.) At its inception, taxpayers were minority stockholders. Pool was president and Murphy sales manager. (R. 34–35.)

Taxpayer Pool had been a builder during all of his business life. Prior to 1935, when he moved to Long Beach, he had lived in Cincinnati, Ohio. During the period of his operations in the Cincinnati area and after moving to Long Beach, but prior to the organization of Arteraft, he had built houses both for sale on his own account and for others under contract. He had never built rental houses for his own account. Throughout his operations he sold all of his houses through brokers. He never had a real estate broker's license and never sold any houses personally (R. 35.)

Taxpayer Murphy moved to California from Illinois in 1933. Prior to that time he had been variously employed. For a short period he had done office work for a concern which built houses. About 1938, he started working as an employee of "Pacific Construction and Finance." While with that concern he worked on "rough drafts of sketches of apartment buildings and home layouts." This work continued until he became connected with Arteraft. He had never sold real estate or had a real estate broker's license. (R. 35.)

Arteraft was organized to engage in residential building construction. During 1941 most, if not all, of its business was that of constructing houses under contract for others. During 1942, the major portion of its income was derived from building houses for sale for its own account, although it did have some

income from building contracts. In 1942, it built for sale on its own account and sold 142 houses in Los Angeles County. In 1943, it built for sale on its own account and sold 188 houses, all of which were likewise located in Los Angeles County. It derived no income in 1943 from building under contract for others. (R. 34–35.)

On August 18, 1942, and February 17, 1943, Artcraft directors considered but turned down Pool's suggestion that it also build rental units. (R. 35–36.) Effective February 10, 1943, regulations imposing restrictions upon housing construction were issued, which entitled housing, approved by the Federal Housing Administration, to allocation of scarce building materials by the War Production Board. These regulations were known as General Orders Nos. 60–2 and 60–3 of the National Housing Agency.[1] Under No. 60–2, the housing was required to be held for rental, with an allowable option, in favor of the tenant only, to purchase at a maximum price of $6,000. (R. 39.) No. 60–3 implemented the restrictions by providing that any private housing, begun after February 10, 1943, was subject to the same rental and sale restrictions. (R. 40.)

On February 23, 1943, Artcraft filed its first application, to build an apartment house,[2] and on May 26,

---

[1] The substance of the orders is set forth in the findings of fact (R. 38–41), and opinion below (Pet. App. 11–13). See 8 Fed. Register 1829–1831.

[2] The date of this application is of some significance here, but gains from the sale of this apartment house are not involved in this case.

1953, another application to build 70 duplexes on Tract 11451. Both of these applications were approved in June 1943. (R. 38.)

In April 1943, by the issuance to them of additional shares of stock, taxpayers became majority stockholders of Artcraft, and on or about June 1, 1943, by purchase of the minority shares, they became the sole stockholders and officers and directors of Artcraft. It was the testimony of Pool and Murphy that the minority stockholders did not desire to engage in construction of rental housing. (R. 37.)

On September 16, 1943, at a special meeting of Artcraft's directors, an agreement was entered into for the sale of these tracts, on which the approved housing was to be built, to the four individual taxpayers as tenants in common. The agreement, expressed in a motion of the directors, stipulated that the taxpayers were to pay all existing and future mortgages or other obligations against the properties out of the moneys received from "the sale, hypothecation or rentals of said properties". It was further stipulated that the taxpayers were to have no personal liability for payment of mortgages or other obligations against the properties other than from the moneys received from "sales, hypothecation or rentals of said property." (R. 41–42.) It was further stipulated that all profits "from the sale, rental or hypothecation of the properties" over and above said indebtedness should be the sole exclusive property of the four taxpayers as tenants in common. (R. 43.)

462212—58——2

The units were rented, as construction was completed, on one-year written leases. On March 13, 1944, all of the units being completed, the agreement to sell the properties to taxpayers was consummated in accordance with its terms, the taxpayers agreeing that they would pay all incumbrances against said properties "so long as rentals or sales of said properties produced sufficient funds" therefor. (R. 44–45.)

On or about April 1, 1944, taxpayers formed a joint venture (or partnership) known as Edward Pool and Associates (referred to as Associates) for the purpose of holding and dealing with the properties which had been transferred to them by Arteraft. (R. 46–47.)

On January 4, 1945, Arteraft made a third application for the construction of 109 duplexes on Tract No. 13163, Long Beach, subject to the requirements of General Orders Nos. 60–2 and 60–3. The application was approved on February 5, 1945, and on February 26, Arteraft agreed to transfer this property and the buildings to be constructed thereon to taxpayers, upon the same terms and conditions with respect to payment of encumbrances against the property out of rentals or sales as was previously agreed to. (R. 48–49.) It was likewise further stipulated that all profits remaining from the rental, sale, or hypothecation, over and above the amount of the mortgage indebtedness, would be the sole and exclusive profit of the four individual taxpayers. (R. 50.)

---

[1] It is the gains from the sale of the 109 duplexes on this Tract No. 13163 and the 70 duplexes on Tract No. 11451 that are involved in this case.

On February 1, 1946, this set of duplex housing units having been fully completed, the agreement for the transfer of the properties to the taxpayers was carried out in accordance with its terms. (R. 50–52.) The 100 duplexes on this last tract, Tract No. 13163, were rented on one-year written leases. None of the leases of the 170 units included a purchase option provision, and tenants were advised that the houses were not for sale. (R. 54.)

Effective October 15, 1945, the sales ceilings were removed, but rent controls remained in force. An application by taxpayers and Arteraft for permission to increase rents was denied, and, thereafter, the one-year leases were not renewed when they expired, but the tenants were continued on a month-to-month tenure. The date of the last written lease was April 10, 1946. (R. 54.)

During this period, the Associates maintained no office and had no employees. Its books were kept by an employee of Arteraft. Moreover, the properties were managed by Arteraft which signed the leases as lessor, collected the rents and made the payments, less its commission and expenses, to Associates. (R. 55.)

In October 1945, after the controls on sales prices of war housing had been lifted, there was a very substantial rise in the market price for the type of housing owned by taxpayers. Some time in January or February of 1946, one Philip Boland, a real estate broker, suggested to Pool and Murphy that they permit him to sell the duplexes for them. The proposal was first accepted by Murphy, but Pool did not

agree to it until some time later. An agreement was reached with Boland for the sale of the 70 duplex units on Tract No. 11451 for a flat $500 per unit commission, the taxpayers to supply the office facilities and secretarial help. (R. 57–58). Boland advised Murphy that the gains realized upon the sale of the properties would be capital gains, and Murphy received the same advice from his accountant. (R. 58–59.)

The sale activities on the 70 duplexes on Tract 11451 began in May 1946, and continued to July 1946. The properties were advertised as having been built by Artcraft and for sale by the builder. All of the 70 duplexes were sold in ten weeks' time, the last sale being made on September 6, 1946. (R. 60.)

Meantime, in July 1946, taxpayers and Boland reached a similar agreement for the sale of the 100 duplexes on Tract 13163. The selling operation was conducted in the same manner as the first set, except that Boland, for part of the time at least, employed two salesmen to assist him. The arrangements for financing the sale of the 100 duplexes were made by taxpayer Murphy with an insurance company. The duplexes were advertised as having been built by Artcraft and for sale by the builder. R. 60–62.)[4] The 100 duplexes were sold in the period from August 1946 to June 1947, the longer period being due in part to rent control, which prevented taxpayers from having the properties vacated preparatory to sale.

[4] The text of a typical advertisement is set forth in the opinion below. (Pet. App. 23.)

The creation of vacancies was encouraged, and comparatively few of the units were sold to the tenants. (R. 61–62.)

The 70 duplexes were sold for a total of $828,400 and the 100 duplexes were sold for a total of $1,289,000. (R. 64–65.)

In 1950, taxpayers Pool and Murphy, with a third person, formed a corporation in New Mexico, with Pool as president and Murphy as secretary-treasurer, which engaged in the business of building and selling 98 single-family dwellings. In 1951, the same three individuals formed a corporation in Colorado, with the same officers, which engaged in the same business, selling 192 homes. (R. 67.)

On these facts, after first disposing of certain issues not in controversy here,[5] the Tax Court found that, beginning with the employment of Boland, the four taxpayers began a business of selling real estate, and from April 1946, the 70 duplexes on Tract 11451, and from July 1946, the 100 duplexes on Tract 13163, were held by them primarily for sale to customers in the ordinary course of that business. (R. 70.) Accordingly, the Tax Court held that the gains from the sale of the 170 duplexes were gains from the sale of property used in the trade or business of taxpayer within the meaning of Section 117 (j), and hence were not capital gains on the sale of capital assets within the meaning of Section 117 (a).

---

[5] These issues related to the question of the taxation of the transfer of the properties from Arteraft to taxpayers. (R. 70–80.)

The Tax Court noted that no rigid rule can be formulated to determine the issue and that in the end each case must stand upon its own peculiar facts and circumstances. (R. 82.) It reviewed the evidence (R. 82–88), pointing out that, at the time of the distribution of the properties by Arcraft to taxpayers, their purpose was mixed, and that there was no question that, after the distribution and before being placed on the market, the properties were used in the conduct of a rental business. (R. 82–83.) However, the Tax Court concluded that taxpayers were not liquidating an unprofitable rental business, but entering a more profitable sales business. (R. 86.) As the Tax Court said (R. 87): "All of the facts considered, it would be difficult to imagine a selling operation or business which was more actively conducted and carried on than the one here."

The Court of Appeals, as its opinion shows, also carefully reviewed the evidence. (Pet. App. 14–34.) On the basis of all the facts, the court sustained the findings of the Tax Court. In its view of the evidence, taxpayers' main business was selling; they acquired the properties in question for rental or sales; they were forced into rental as an incidental business by the wartime restrictions on the sale of housing; and they returned to their sales business as soon as price restrictions were lifted. (Pet. App. 30–31.) In any case, the court below held, even if the properties were originally held for rental, the Tax Court's finding that taxpayers changed their original rental objective into sale in the regular course of business

was amply supported by the undisputed facts of taxpayers' business, purpose of holding, frequency and continuity of sales, and the activity of the taxpayers in promoting sales. (Pet. App. 31–33.)

ARGUMENT

The question presented is one of fact, and the court below correctly affirmed the Tax Court's determination. There is no conflict and no occasion for further review.

1. Section 117 (j) of the Internal Revenue Code of 1939 (*supra*, pp. 3–4) accords preferential capital gain treatment to gains from sales of depreciable business property held for more than six months, but expressly excepts from its coverage property "held by the taxpayer primarily for sale to customers in the ordinary course of his trade or business"[6] Whether particular property falls within the excepted category presents a question of ultimate fact in each case, no one factor being decisive, and the trial court's conclusion should not be disturbed unless clearly erroneous. Among the relevant factors to be considered and weighed are the business of the taxpayer, intention or purpose of the taxpayer in acquiring and holding the property, frequency and continuity of sales, the methods used in making the sales such as advertising or other sales promotion, and any other circumstances bearing upon whether the sales are in furtherance of the taxpayer's

[6] No change in the law, so far as the sale of housing properties is concerned, was made by the corresponding sections of the 1954 Code. Compare Section 117 (a) of the 1939 Code with Sec. 1221 of the 1954 Code, and Sec. 117 (j) with Section 1231 (b) (1). It is to be noted that a specific test for distin-

business.[7] This Court has declined to review similar cases which presented like questions of a factual nature.[8] Because of the inappropriateness of Supreme Court review in cases of this kind, the Government has refrained from seeking certiorari where the de-

---

guishing between sale of capital assets and ordinary business was established in the 1954 Code *only* for the sale of vacant land subdivided into lots (Section 1237).

[7] Cases in the courts of appeals involving the question here presented are legion, and they hold that the question is one of fact. See, *e. g.*, *Monday* v. *Commission* (C. A. 6th), decided February 20, 1958 (58–1 U. S. T. C., par. 9323); *Philber Equipment Corp.* v. *Commissioner*, 237 F. 2d 129 (C. A. 3d); *Harry Slatkin Builders* v. *Commissioner*, 235 F. 2d 189 (C. A. 6th), certiorari denied, 352 U. S. 928; *Curtis Co.* v. *Commissioner*, 232 F. 2d 167 (C. A. 3d); *Pacific Homes* v. *United States*, 230 F. 2d 755 (C. A. 9th); *Homann* v. *Commissioner*, 230 F. 2d 671 (C. A. 9th); *Greenspon* v. *Commissioner*, 229 F. 2d 947 (C. A. 8th); *Chandler* v. *United States*, 226 F. 2d 403 (C. A. 7th); *Cohn* v. *Commissioner*, 226 F. 2d 22 (C. A. 9th); *Smith* v. *Dunn*, 224 F. 2d 353 (C. A. 5th); *Goldberg* v. *Commissioner*, 223 F. 2d 709 (C. A. 5th); *Shearer* v. *Smyth*, 221 F. 2d 478 (C. A. 9th), certiorari denied, 350 U. S. 840; *Galena Oaks Corp.* v. *Scofield*, 218 F. 2d 217 (C. A. 5th); *Dougherty* v. *Commissioner*, 216 F. 2d 110 (C. A. 6th); *Dillon* v. *Commissioner*, 213 F. 2d 218 (C. A. 8th); *Home Co.* v. *Commissioner*, 212 F. 2d 637 (C. A. 10th); *Victory Housing No. 2* v. *Commissioner*, 205 F. 2d 371 (C. A. 10th); *Palos Verdes Corp.* v. *United States*, 201 F. 2d 256 (C. A. 9th); *Winnick* v. *Commissioner*, 199 F. 2d 374 (C. A. 6th); *Mauldin* v. *Commissioner*, 195 F. 2d 714 (C. A. 10th); *Rollingwood Corp.* v. *Commissioner*, 190 F. 2d 263 (C. A. 9th); *King* v. *Commissioner*, 189 F. 2d 122 (C. A. 5th), certiorari denied, 342 U. S. 829; *Rubino* v. *Commissioner*, 186 F. 2d 304 (C. A. 9th), certiorari denied, 342 U. S. 814; *Three States Lumber Co.* v. *Commissioner*, 158 F. 2d 61 (C. A. 7th).

[8] See, *e. g.*, *Harry Slatkin Builders* v. *Commissioner*, *supra*; *Shearer* v. *Smyth*, *supra*; *Rubino* v. *Commissioner*, *supra*; *King* v. *Commissioner*, *supra*.

cision has been adverse to it.[*] There is no more occasion for further review of this case than of others involving comparable questions.

2. The record amply warrants the Tax Court's conclusion that the property here involved—duplex housing units—was held by taxpayers in their business primarily for sale to customers. Taxpayers' business before the sales in question was that of building and selling houses, which were built by taxpayers' wholly-owned building and sales corporation, Artcraft. Taxpayers acquired the property from Artcraft for rental or sale; the houses were held only for rental during a period when wartime restrictions made sales less profitable than rentals; the rentals were managed for taxpayers by their corporation, Artcraft; and, as soon as the restrictions were removed, taxpayers terminated the leases and encouraged vacancies. While a broker was hired to sell the houses, taxpayers advertised the houses for sale by the builders, and otherwise actively participated in the sales promotion, procuring the financing for many of the houses. The sales were frequent and conducted over a two-year period, and after the sales of the housing units, taxpayers resumed the business of building and selling houses.

On the basis of these facts, the Tax Court was fully justified in concluding that the properties were held primarily for sale to customers in the ordinary course of their business. (R. 70.) Under familiar rules

---

[*] See, *e. g.*, *Philber Equipment Corp.* v. *Commissioner*, *supra*; *Smith* v. *Dunn*, *supra*; *Goldberg* v. *Commissioner*, *supra*; *Curtis Co.* v. *Commissioner*, *supra*.

governing the scope of judicial review of the trial court's factual determination, the court below was equally justified in sustaining its decision. Both courts below having decided the factual issue against taxpayer, their concurrent findings are entitled to finality here. *Corn Products Co.* v. *Commissioner*, 350 U. S. 46, 51.

3. There is no conflict. Since the question is factual, each case in this field turns, as it must, on its own record. In view of the wide variations in evidentiary content of such cases, differences of result are not only inevitable but also appropriate. That an appellate court may have been warranted in reversing a trial court's decision in some other case involving a similar question scarcely furnishes a basis for assuming, as do the taxpayers, that the court below was obliged to reverse in this case.

Taxpayers' entire argument rests upon their assertion that, having originally held the property for investment, they decided to liquidate and accordingly sold the property in its existing condition piece-by-piece, as expeditiously as possible and at the best possible prices, employing a broker to conduct the sale. (Pet. 8, 20.) On these assumed facts of the case, taxpayers contend that the decision below is in direct conflict with the decisions of the Third, Seventh, and Eighth Circuits, and especially the decision of the Third Circuit in *Curtis Co.* v. *Commissioner*, 232 F. 2d 167 (Pet. 9–14, 20); and that the decision below applies an erroneous rule of law that the gains from the sale of investment property in the same manner

as the active conduct of a business can be taxed as ordinary income. (Pet. 14, 20.)

The entire argument falls, however, because the assumed facts are not the facts found by the Tax Court, sustained by the court below, and conclusive here.[10] Taxpayers' heavy reliance upon *Curtis Co.* v. *Commissioner* to show a conflict is thus misplaced.[11] Indeed, the *Curtis* decision expressly approved the rule of law which the courts below applied here—namely, that preferred capital-gain treatment on sales of investment property is precluded if "the purpose of the sales is primarily making money by carrying on a substantial part of the activities of a person engaged in the business of selling houses."

---

[10] See *supra*, pp. 4–11, 15. This is further shown by taxpayers' attack on the factual findings, *e. g.*, their assertion that the court below "attributed erroneously" the selling activities of the real estate broker to taxpayer. (Pet. 20.) In this connection, it may be noted that the Tax Court and the court below went on to find that, independently of the broker's activities, "There are other facts that show active participation by the taxpayers in the conduct of the sales." (Pet. App. 25–27, R. 61–62, 87.) Moreover, taxpayers concede, as they must, that a taxpayer can change from an investment business to the ordinary sales business if he improves or changes the property before sale. (Pet. 20–21.) Taxpayers here did change the rental property to make it saleable; *i. e.*, they terminated all written one-year leases and encouraged vacancies, and few houses were sold to tenants. (R. 54, 62.)

[11] Compare the summary statement of the facts of the *Curtis* case (232 F. 2d 169) with the summary by the court below. (Pet. App. 30–33.) The facts of *Philber Equipment Corp.* v. *Commissioner*, 237 F. 2d 129 (C. A. 3d), are clearly different from those at bar.

(232 F. 2d 169).[12] And, as the *Curtis* opinion states, the decision in each case turns upon the facts, which are "as variable as human activities." (232 F. 2d 170.) The other decisions relied upon by taxpayers for a showing of conflict (Pet. 13–14) are to the same effect.[13]

---

[12] Again at page 170, the *Curtis* opinion states the question to be "whether on these facts the conclusion is supportable that petitioner went *ad hoc* into the ordinary course of business when it sold these rental properties."

[13] Thus, in *Greenspon* v. *Commissioner*, 229 F. 2d 947, 951–952, the Eighth Circuit, reviewing the decisions and after first noting an apparent conflict of law, reached the conclusion that the apparent conflicts are to be resolved by "a more thorough and complete survey of the entire factual situation."

In *Dillon* v. *Commissioner*, 213 F. 2d 218, 220, the Eighth Circuit stated the very rule which taxpayers contend is erroneous:

> One may, of course, liquidate a capital asset. To do so it is necessary to sell. The sale may be conducted in the most advantageous manner to the seller and he will not lose the benefits of the capital gain provision of the statute, unless he enters the real estate business and carries on the sale in the manner in which such a business is ordinarily conducted. In that event, the liquidation constitutes a business and a sale in the ordinary course of such a business and the preferred tax status is lost.

It is to be noted that the *Dillon* court derived this rule from *Home Co.* v. *Commissioner*, 212 F. 2d 637 (C. A. 10th), where the court reached the opposite factual conclusion that the sales were in the ordinary course of business.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

J. LEE RANKIN,
Solicitor General,
CHARLES K. RICE,
Assistant Attorney General,
ALEXANDER F. PRESCOTT,
JOSEPH KOVNER,
Attorneys.

APRIL 1958.

U. S. GOVERNMENT PRINTING OFFICE 19 7